

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PHUSION PROJECTS, LLC,)
vs.)
Plaintiff,)
vs.)
UNITED BRANDS CO., INC,)
Defendant.)
Civil Action No. _____

COMPLAINT

Plaintiff PHUSION PROJECTS, LLC (“Phusion”), for its complaint against defendant UNITED BRANDS CO., INC. (“United Brands”), alleges and states as follows:

NATURE OF THE CASE

1. This is an action arising out of United Brands' manufacturing, marketing, and offering for sale its Joose "J Series" flavored malt beverage product using a container and label that is confusingly similar to that of Phusion's "Four Loko" flavored malt beverage product. The Joose J Series packaging is overwhelmingly similar to that of Phusion's Four Loko packaging, and the two products are direct competitors in the flavored malt beverage category of alcohol beverages, serving identical commercial markets and targeting identical consumer bases. United Brands' deliberate use of this confusingly similar packaging constitutes trade dress infringement, false designation of origin, unfair competition, and violation of the Illinois Deceptive Trade Practices Act.

2. In particular, as shown in one example depicted below, United Brands has infringed Phusion's trade dress because United Brands' newly-designed Joose J Series packaging misappropriates numerous distinctive elements from the Four Loko trade dress: (i) multi-toned

coloring; (ii) a camouflage pattern; (iii) a black paint splatter element; (iv) water beads; and (v) large vertically-oriented block lettering. Unless enjoined, United Brands' unlawful conduct will cause irreparable harm to Phusion. In particular, consumers will mistakenly believe that the Joose J Series product is associated with Phusion or Phusion's Four Loko line of flavored malt beverages, thus undermining the goodwill Phusion has carefully cultivated for its Four Loko brand over the past eight years. Therefore, Phusion brings this action to enjoin United Brands' unlawful and unfair conduct.



THE PARTIES

3. Phusion is a limited liability company organized under the laws of the State of Delaware, with its principal place of business located in Chicago, Illinois. Phusion's alcohol product lines, including Four Loko, Moskato Life, Signature Cocktails, and Earthquake, are sold throughout the United States, including in Illinois and in this judicial district.

4. United Brands is a corporation organized under the laws of the State of California, with a principal place of business located in San Diego, California. United Brands' products

include Joose, Joose Margarita, Joose Cocktails, and Stack 101, and are sold throughout the United States, including in Illinois and in this judicial district.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this suit pursuant to 15 U.S.C. § 1121.

6. This Court has personal jurisdiction over United Brands pursuant to 735 ILCS 5/2-209(a)(2) because United Brands has committed a tortious act within Illinois. Upon information and belief, United Brands has advertised, marketed, and/or offered for sale its infringing Joose J Series product in Illinois and in this judicial district.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §1331(b) because a substantial part of the events giving rise to the claim occurred within this judicial district.

FACTUAL ALLEGATIONS

The Four Loko Brand and Trade Dress

8. Starting as early as 2008, Phusion has incorporated numerous distinctive design elements in the packaging for its “Four Loko” premium flavored malt beverage brand. These design elements include multi-toned coloring, a camouflage pattern, a black paint splatter element, water beads, and large vertically-oriented block lettering (individually and collectively, the “Four Loko Trade Dress”). For as long as eight years, Phusion has used various of these design elements in the packaging for its Four Loko products and other marketing materials, examples of which are attached hereto as Exhibits A-D.

9. The Four Loko Trade Dress, – in particular the multi-toned coloring and camouflage pattern – has been critical to the success of the Four Loko line of products. In marketing the Four Loko product to its wholesalers and retailers over the past several years,

Phusion's promotional materials have highlighted Four Loko's "eye catching packaging" as a unique product identifier and, consequently, a significant driver of sales.

10. In March 2015, Phusion began marketing a new product in its Four Loko line called "Four Loko Gold," which was the first product in the line to feature 14% alcohol by volume ("ABV") (the other products in the Four Loko line feature 12% ABV). Phusion incorporated the familiar design elements from its previous Four Loko products into the Four Loko Gold packaging, and also introduced a new multi-toned gold color for the camouflage pattern.

11. The Four Loko Trade Dress is distinctive, as it utilizes a unique design pattern that distinguishes the Four Loko products from other alcohol beverages. The Four Loko Trade Dress was selected to reinforce the brand and identity of the product. In particular, the lively patterns, flashy multi-toned coloring, and oversized block lettering help to convey a bold, fun, and eye-catching image.

12. The Four Loko Trade Dress is not functional.

13. Phusion has invested substantially in promoting and advertising its Four Loko brand that trades heavily off of the distinctive and recognizable Four Loko Trade Dress. In addition to its product packaging, Phusion regularly uses the Four Loko Trade Dress in various other aspects of its marketing and branding activities, including, without limitation, in its point-of-sale marketing, its branded merchandise and apparel, its websites, its promotional online videos, its various social media accounts, and at its sponsored events. For example, at performances sponsored by Phusion, the background of the stage features the camouflage pattern in order to be evocative of the Four Loko Trade Dress. The Four Loko Trade Dress has also appeared on delivery trucks and billboard advertisements.

14. As part of its annual marketing campaign for its Four Loko brand, Phusion has sponsored numerous events over the past several years, such as the Four Loko After Party, Four Loko Spring Escape, and Lokoween. These events have all incorporated the Four Loko Trade Dress at the events and in various marketing materials describing the events.

15. Phusion has carefully and systematically used the Four Loko Trade Dress to cultivate a strongly recognized global brand, and the unique design is one of the most important ways in which consumers identify the brand on retail shelves amidst numerous beverage products or in the hands of other consumers.

16. In part because of the distinctiveness and familiarity of the Four Loko Trade Dress and the strength of the Four Loko brand, Four Loko has enjoyed substantial commercial success. For example, as of the date of this filing, Four Loko Gold is one of the top five products nationally (in terms of sales in dollars) in the single 24-oz flavored malt beverage category. The Four Loko brand family currently enjoys sales of almost 20 times more than the sales of the Joose brand family, giving United Brands significant incentive to attempt to capitalize on Four Loko's goodwill by imitating its trade dress.

Likelihood of Confusion

17. Upon information and belief, United Brands adopted a trade dress for its new Joose J Series line of products in early 2016 that, like the Four Loko Trade Dress, features multi-toned coloring, a camouflage pattern, a black paint splatter element, water beads, and large vertically-oriented block lettering.

18. The Joose J Series and Four Loko products serve identical markets – namely, the flavored malt beverage market – and target identical consumer bases. Moreover, Joose J Series

and the Four Loko Gold products feature the identical ABV and are sold in close proximity on retail shelves.

19. The parties' respective products are distributed through similar channels of trade, including being offered for sale in convenience stores, grocery stores, gas stations, and liquor stores.

20. The parties' respective products are sold in individual containers of identical size next to each other on retail shelves, and are nearly always priced identically in every market. Moreover, given that the parties' respective products are relatively low-cost items and are often an impulse purchase, consumers are unlikely to exercise a great deal of care before making a purchase.

21. Due to the similarity between the products' respective packaging, and the fact that they serve identical markets and target identical consumer bases, there is a likelihood that consumers, retailers, and wholesalers of these products will mistakenly believe that the Joose J Series product is sponsored or licensed by, or is associated or affiliated with, Phusion.

22. The overwhelming similarity of the Joose J Series packaging to that of Four Loko's packaging suggests that United Brands deliberately designed the Joose J Series packaging to be as similar as possible to the Four Loko product for the purpose of trading on the goodwill that Phusion has cultivated for its Four Loko brand.

Irreparable Harm

23. If the Joose J Series product is marketed and/or sold with its current packaging, it will undermine the goodwill that Phusion has developed for its Four Loko brand and trade dress. Additionally, Phusion will lose sales and revenues, as customers purchase the Joose J Series

product under the mistaken belief that the product comes from, is sponsored or licensed by, or is associated or affiliated with, Phusion.

COUNT I
Trade Dress Infringement
(15 U.S.C. § 1125(a))

24. Phusion repeats and realleges each and every allegation made in Paragraphs 1-23 as if fully set forth herein.

25. The Four Loko Trade Dress is used in commerce, is non-functional, and is inherently distinctive.

26. United Brands has adopted a trade dress for its Joose J Series product that is overwhelmingly similar to the Four Loko Trade Dress.

27. United Brands' manufacture, marketing, distribution, offering for sale, and/or sale of its Joose J Series product is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or affiliation of the product. Consumers seeing the Joose J Series product in its current packaging will likely be deceived into believing that the Joose J Series product is sponsored or licensed by, or is associated or affiliated with, Phusion.

28. United Brands' use of the Joose J Series packaging constitutes trade dress infringement in violation of 15 U.S.C. 1125(a).

29. Unless enjoined, United Brands' unlawful conduct will cause Phusion to suffer irreparable harm.

30. For the foregoing reasons, Phusion is entitled to injunctive relief enjoining United Brands' use of the infringing trade dress, pursuant to 15 U.S.C. § 1125(a).

COUNT II
False Designation of Origin
(15 U.S.C. § 1125(a))

31. Phusion repeats and realleges each and every allegation made in Paragraphs 1-30 as if fully set forth herein.

32. The Four Loko Trade Dress is used in commerce, is non-functional, and is inherently distinctive.

33. United Brands has adopted a trade dress for its Joose J Series product that is overwhelmingly similar to the Four Loko Trade Dress.

34. United Brands' manufacture, marketing, distribution, offering for sale, and/or sale of its Joose J Series product is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or affiliation of the product. Consumers seeing the Joose J Series product in its current packaging will likely be deceived into believing that the Joose J Series product is sponsored or licensed by, or is associated or affiliated with, Phusion.

35. United Brands' use of the Joose J Series packaging constitutes false designation of origin in violation of 15 U.S.C. 1125(a).

36. Unless enjoined, United Brands' unlawful conduct will cause Phusion to suffer irreparable harm.

37. For the foregoing reasons, Phusion is entitled to injunctive relief enjoining United Brands' use of the infringing trade dress, pursuant to 15 U.S.C. § 1125(a).

COUNT III
Unfair Competition
(15 U.S.C. § 1125(a))

38. Phusion repeats and realleges each and every allegation made in Paragraphs 1-37 as if fully set forth herein.

39. The Four Loko Trade Dress is used in commerce, is non-functional, and is inherently distinctive.

40. United Brands has adopted a trade dress for its Joose J Series product that is overwhelmingly similar to the Four Loko Trade Dress.

41. United Brands' manufacture, marketing, distribution, offering for sale, and/or sale of its Joose J Series product is likely to cause confusion among consumers as to the source, origin, or sponsorship of the product. Consumers seeing the Joose J Series product in its current packaging will likely be deceived into believing that the Joose J Series product is sponsored or licensed by, or is associated or affiliated with, Phusion.

42. United Brands' use of the Joose J Series packaging constitutes trade dress infringement in violation of 15 U.S.C. 1125(a).

43. Unless enjoined, United Brands' unlawful conduct will cause Phusion to suffer irreparable harm.

44. For the foregoing reasons, Phusion is entitled to injunctive relief enjoining United Brands' use of the infringing trade dress, pursuant to 15 U.S.C. § 1125(a).

COUNT IV
Violation of Illinois Deceptive Trade Practices Act
(815 ILCS 510/1 *et seq.*)

45. Phusion repeats and realleges each and every allegation made in Paragraphs 1-44 as if fully set forth herein.

46. United Brands' manufacture, marketing, distribution, offering for sale, and/or sale of its Joose J Series product is likely to cause confusion or misunderstanding among consumers as to the source, sponsorship, approval, affiliation, connection, or association of the product.

47. United Brands' use of the Joose J Series packaging is a violation of 815 ILCS 510/2(a).

48. For the foregoing reasons, Phusion is entitled to injunctive relief enjoining United Brands' use of the infringing trade dress, pursuant to 815 ILCS 510/3.

PRAYER FOR RELIEF

WHEREFORE, Phusion prays that the Court grant it the following relief:

- a. an order enjoining United Brands and all those acting in concert or participation with it (including, but not limited to, its officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns, and contracting parties) from marketing, selling, offering to sell, or otherwise making any other use of its Joose J Series product in its present trade dress or any other trade dress that is confusingly similar to that of the Four Loko Trade Dress;
- b. an award for monetary damages, to the extent permitted by applicable law;
- c. an award of Phusion's reasonable attorneys' fees and costs, to the extent permitted by applicable law; and
- d. an award of such other and further relief as the Court deems just and proper.

Dated: April 7, 2016

PHUSION PROJECTS, LLC

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